91-1905

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

JOHN CARVER, AL SAMPSON,
BILL McCLUNG, DONALD J. MEYERS,
and MARTIN L. HAGOOD

Petitioners

v.

WESTINGHOUSE HANFORD COMPANY,
a corporation;
HANFORD OPERATIONS AND ENGINEERING PLAN

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. If the administrator of an ERISA-covered pension plan has failed to adopt a "formal" written plan document to govern the administration of the plan at the time when it has in fact begun to administer the plan, should the initial administration of the plan be legally governed under ERISA by more "informal" written documents which describe the important features of the plan and which have been distributed to plan participants in order to protect the rights of the plan participants as much as possible until a more "formal" plan document has been adopted?

2. If so, should the administrator of the pension plan then have to comply with the provisions of 29 USC §1054(g) and 29 USC §1082(c)(8) governing the

amendment of ERISA-covered pension plans if it thereafter seeks to adopt a more "formal" written plan document to govern the administration of the plan which would have the effect of reducing the accrued benefits of plan participants?

3. Does 29 USC §1060 require that, where an employer has "maintained" the pension plan(s) of one or more predecessor employers, the employer must then treat the service of plan participants with such predecessors as service with the employer for the purpose of calculating the pension benefits those participants are entitled to receive under the new plan?

4. Do the principles of estoppel legally require the administrators of ERISA-covered pension plans to abide by the promises that they have made to plan participants under the circumstances that

are involved in the instant matter and under similar circumstances that will undoubtedly arise in other cases?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed accurately in the caption of the case.

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REFERENCE TO REPORTS

See Appendix for reference to the official and unofficial reports of any opinions delivered in the courts below.

STATEMENT OF JURISDICTION

The instant petition was filed with this Court within ninety (90) days of the date upon which the Ninth Circuit Court of Appeals rendered its decision in this matter, December 17, 1991, as provided for by the rules of this Court. This Court's jurisdiction is invoked under 28 USC §1254.

STATEMENT OF THE CASE

In this lawsuit, the plaintiffs are contending that the defendants have reneged upon a legally-binding commitment which they made to the plaintiffs to the effect that the plaintiffs would receive credit under a pension plan that was being operated and administered by the

defendants, and in which the plaintiffs became participants in June of 1987, for certain of their prior years of employment service with previous employers when their pension benefits were being calculated under this new pension plan, the Hanford Operations and Engineering Pension Plan (the HOEPP). The parties herein are the plaintiffs; their current or former employer, defendant Westinghouse Hanford Company (WHC); and the HOEPP. (See Amended Complaints contained in Appendix).

At the time when this lawsuit was commenced, all of the plaintiffs were employed by WHC at the Hanford Nuclear Reservation near Richland, WA (the HNR). (See Stipulation of Facts in Appendix). The HNR is, and has been for many years, under the control and management of the U. S. Department of Energy (DOE). (Id).

DOE delegates the responsibility for maintaining the day-to-day operation of the facilities at the HNR to private contractors. (Id). Over the years, the identity of these private contractors has changed repeatedly. (Id). However, throughout this period of time a significant segment of the workforce at the HNR has remained constant, and employees such as the plaintiffs have simply been transferred from one contractor to another contractor when a change in contractors has taken place. (Id). All of the plaintiffs herein have worked for several of these different private contractors while they were employed at the HNR. (Id).

Immediately prior to June of 1987, DOE had delegated the responsibility for operating the facilities at the HNR to several different private contractors.

(Id). As of June 29, 1987, DOE consolidated the responsibility for operating most of the facilities at the HNR in the hands of a single private contractor, WHC. (Id).

Prior to this "consolidation" on June 29, 1987, each of the private contractors at the HNR had operated its own pension plan. (Id). It was decided by DOE prior to "consolidation" that a new site-wide pension plan for the non-union employees who continued to work at the HNR after "consolidation" should be adopted at the time of consolidation, and that the assets of all of the previous non-bargaining unit pension plans that had been in existence at the HNR should be merged into this pension plan at the time of consolidation. (Id).

WHC took the position, both before and after June 29, 1987, during

negotiations that it had with DOE about how the new pension plan should be constituted, that the new plan should recognize all of an employee's post-1965 years of service at the HNR for benefit calculation purposes. (Id). WHC took this position, at least in part, so that it could provide an additional "perk" to its non-union employees that was not enjoyed by its union employees. (See affidavit excerpt in Appendix).

At the time of consolidation on June 29, 1987, each plaintiff herein became an employee of WHC, with no material change in his job duties or salary. (See Stipulation). At or around the time of consolidation, WHC provided the plaintiffs herein, as well as similarly-situated employees, with several documents containing information about the new "consolidated" pension plan for

non-union employees that was going to become effective on June 29, 1987. (Id). The defendants have admitted that, based upon the content of these documents, the plaintiffs reasonably believed at the time of consolidation, that when their benefits were being calculated under the new HOEPP pension plan, they would receive credit for all of their prior years of service with all of the DOE contractors that were operating at the HNR from January 1, 1965 onward. (Id).

Additionally, during the period of time between June and December of 1987, at least three individuals who became participants in the HOEPP on June 29, 1987 retired from WHC's employment and were given credit when their pension benefits were being calculated under the new HOEPP pension plan for all of their prior years of service with all Hanford

contractors during 1965 and thereafter; that is, their benefits under the HOEPP were calculated in the manner in which the plaintiffs are contending that the plaintiffs' benefits should be calculated under the HOEPP. (Id).

Even though the defendants began administering the HOEPP in June of 1987, as described above, they did not adopt what they considered to be a formal written "plan document" relating to the HOEPP until December of 1987. (Id). The plaintiffs contend that the written information about the HOEPP that was distributed to the plaintiffs on or about June 29, 1987 did in fact constitute a "plan document". (Id). The "plan document" that was adopted by the defendants in December of 1987 specifically provides that the plaintiffs and other similarly-situated HOEPP

participants are not entitled to have their prior years of service with other Hanford contractors recognized for benefit calculation purposes under the HOEPP unless those prior years of service were recognized for that purpose by the contractor for whom the employee was working immediately prior to consolidation. (See Appendix). When the defendants adopted their "formal plan document" in December of 1987, they did not comply with the procedures that are set forth in 29 USC §1054(g) and 29 USC §1082(c)(8). (See Stipulation).

It was not until the first half of 1988 that the plaintiffs first learned that the defendants were going to refuse to link together their prior years of service for pension benefit calculation purposes under the HOEPP when they retired. (Id). As a result of the

defendants' refusal to credit the plaintiffs' prior years of service when their pension benefits were being calculated under the HOEPP, the plaintiffs commenced the instant lawsuit against the defendants in the Federal District Court for the Eastern District of Washington. (See Amended Complaint). The District Court had jurisdiction of this matter pursuant to 29 USC §1132. After discovery, the parties eventually entered into a Stipulation of Facts, which they submitted to the trial court, and they then filed cross-motions for summary judgment. (See District Court decision in Appendix). On July 18, 1990, District Court Judge Alan McDonald granted the defendants' motion for summary judgment, and denied the plaintiffs' motion for summary judgment. (Id). Thereafter, Judge McDonald denied

the plaintiffs' timely motion for reconsideration. (See Order Denying Reconsideration in Appendix). The plaintiffs then filed a timely appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the decision of the District Court in a decision rendered on December 17, 1991. This timely Petition for Certiorari has followed.

ARGUMENT

A. THE DEFENDANTS ARE REQUIRED BY ERISA TO PROVIDE THE PLAINTIFFS WITH THE CREDIT FOR PRIOR SERVICE WHICH THE PLAINTIFFS WERE PROMISED THEY WOULD RECEIVE.

WHC repeatedly assured the plaintiffs and other similarly-situated individuals in writing, both before and after June 29, 1987, that a new WHC pension plan for non-bargaining unit employees was going to "become effective"

on June 29, 1987 and that participants in this new plan (the HOEPP) would begin earning credit under the plan on June 29, 1987. (See Stipulation). The documents in which these assurances were made contained a description of most of the important features of the new pension plan. (Id).

Furthermore, the defendants then in fact began administering the HOEPP on June 29, 1987 (i.e., at least three individuals actually retired under the HOEPP between June 29, 1987 and the time when the "formal HOEPP plan document" was "adopted" by the defendants in December of 1987). (Id).

Thus, given this undisputed factual situation, it is clear that the HOEPP became effective and was "established" for the purposes of ERISA coverage on June 29, 1987. Scott v. Gulf Oil

Corporation, 754 F.2d 1499 (9th Cir., 1985); Donovan v. Dillingham, 688 F.2d 1367 (11th Cir., 1982); Robbins v. Lynch, 836 F.2d 330 (7th Cir., 1988); Petrella v. N. L. Industries, 529 F.Supp. 1357 (D. NJ, 1982); California Hospital Assn. v. Henning, 569 F.Supp. 1544 (C.D. Cal., 1983); Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir., 1984); Dippel v. Joint Board of Trustees of Operating Engineers, 97 LC ¶10357 (D. D.C., 1982).

The rationale for extending ERISA coverage to employee benefit plans which in fact exist and which are being administered even though no formal written "plan document" has yet been adopted by the administrator of the employee benefit plan is set forth clearly in both the Scott and the Donovan decisions:

> "Failure to meet . . . (the ERISA requirement that a plan

> must be administered pursuant to a written instrument) . . . does not exempt an employer from coverage by ERISA. Such failure merely indicates a failure by the employer to comply with ERISA. Were such failure to exempt an employer from coverage by ERISA, employers could escape ERISA's coverage merely by failing to comply with its requirements. . . ."

Scott, supra, at 1503-1504.

Thus, based upon the foregoing discussion, it is clear that the HOEPP came into existence on June 29, 1987 and was covered by ERISA from that date forward. Scott, supra; Donovan, supra; Blau, supra. (See also 29 USC §1054(f)).

Given the fact that the HOEPP undisputedly came into existence and was being administered on June 29, 1987, the question arises as to which document or documents should be held to have governed the administration of the HOEPP during the period of time between June 29, 1987

and December of 1987. The plaintiffs contend that the administration of the HOEPP during this period of time was governed by the documents contained in Attachment C to the parties' Stipulation, since those documents were the only written instruments in existence which described the HOEPP during that period of time. The defendants are contending that the administration of the HOEPP between June and December, 1987 was governed by the "plan document" which did not even exist until December of 1987. District Court Judge McDonald and the Ninth Circuit Court of Appeals agreed with the defendants. Plaintiffs respectfully submit that such a holding, if allowed to stand, would seriously undermine the principles behind the enactment of ERISA.

ERISA was enacted because Congress was concerned about the inequitable

manner in which pension plans had often been administered by employers in the past. (See 29 USC §1001(a)). ERISA is remedial in nature, and its provisions must be construed in the light that is most favorable to participants in employee benefit plans. Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir., 1984). ERISA was enacted to: provide security to participants in employee benefit plans; provide those participants with knowledge about their rights and benefits under employee benefit plans; and to allow those participants to police the manner in which their employee benefit plans were being administered. Blau, supra, at 1356; Scott, supra, at 1503-1504; Donovan, supra, at 1373.

ERISA also established "minimum standards" which plan administrators were

required to adhere to when they were administering employee benefit plans. (See 29 USC §1001(a)). One of these "minimum standards" is that every employee benefit plan must be "established and maintained" pursuant to a "written instrument". (See 29 USC §1102(a)(1)). The responsibility to adopt a "written instrument" to govern the administration of an employee benefit plan is a fiduciary responsibility that is placed upon the administrator of such a plan by ERISA, rather than a prerequisite to the establishment of coverage under ERISA. Donovan, supra; Scott, supra.

The defendants in this matter undisputedly failed to promulgate a "formal plan document" of the nature that would normally be expected to exist in order to govern the administration of a

pension plan such as the HOEPP until several months after they had begun administering the HOEPP. Thus, this case squarely presents the question of what legal consequences should flow from the failure of the administrator of a pension plan to adopt, at the time when it begins to administer the plan, a written document which would allow the participants in the plan to become as knowledgeable about the plan and the way that it is being administered as is contemplated by ERISA.

Clearly, both existing case law and the policy considerations which led to the enactment of ERISA compel a conclusion that plan participants must be provided with as much protection as possible, and that therefore, plan administrators must be required to adhere to whatever written documents, either

"formal" or "informal" that the plan administrators have in fact promulgated concerning the terms and/or the administration of an employee benefit plan in a particular instance at the time when the administration of the plan actually commences, and that furthermore, plan administrators must thereafter comply with ERISA's requirements for amending an employee benefit plan if they later wish to adopt a more "formal plan document" to govern the terms and the administration of their plan. Blau, supra; Scott, supra; Donovan, supra; Petrella, supra; California Hospital Assn. v. Henning, supra; Dippel, supra; 29 USC §1101(a); 29 USC §1102(a)(1); McKnight v. Federal Life and Health Insurance Co., 768 F.2d 1566 (11th Cir., 1985); 29 USC §1022 (requiring distribution of summary plan

description).

In this instance, the only written documents which the defendants had promulgated concerning the terms and the administration of the HOEPP as of June 29, 1987 are the documents that are contained in Attachment C to the parties' Stipulation. Therefore, under existing case law and under the policy consideration that led to the enactment of ERISA in the first place, the appellants respectfully submit that those documents must be held to constitute the documents that governed the administration of the HOEPP pursuant to 29 USC §1102(a)(1) during the period of time between June and December of 1987. (Id).

A review of the documents that are contained in Attachment C shows that they are: clear and unambiguous; and that

they entitle the plaintiffs to receive the benefits which they are seeking in this matter (i.e., they contain unambiguous promises that plaintiffs will receive credit under the HOEPP for benefit calculation purposes for their prior years of service with past Hanford contractors and/or with their parent companies).

When the defendants adopted their "formal HOEPP plan document" in December of 1987 they admittedly did not follow, and have not followed to date, the procedures for amending an employee benefit plan that are set forth in 29 USC §1054(g) and 29 USC §1082(c)(8). As a result, well-established case law makes it clear that the defendants' adoption of this "formal HOEPP plan document" constituted a legally ineffective attempt by the defendants to amend the HOEPP in a

manner that would illegally reduce the "accrued benefits" of participants in the HOEPP, including the plaintiffs. Meagher v. Int'l. Assn. of Machinists, 856 F.2d 1418 (9th Cir., 1988); Shaw v. IAM&AW Pension Plan, 750 F.2d 1458 (9th Cir., 1985); Batchelor v. IBEW Local 861, 877 F.2d 441 (6th Cir., 1989); Collins v. Seafarers' Pension Trust, 846 F.2d 936 (5th Cir., 1988); Hoover v. Teamsters Pension Fund, 756 F.2d 977 (3rd Cir., 1985).

Three of the cases cited above involved nearly identical factual situations to the one that is presented in the instant matter, where pension plans were amended in such a manner that the number of years of a participant's service that could be taken into account when the participant's pension benefits were being calculated were reduced by the

amendment, and in each such instances, the plan administrators were found to have violated 29 USC §1054(g) and 1082(c)(8). Hoover, supra; Collins, supra; Batchelor, supra.

Therefore, because the defendants did not comply with the provisions of 29 USC §1054(g) and 29 USC §1082(c)(8) in connection with their attempted amendment of the HOEPP in December of 1987, plaintiffs respectfully submit that their attempted amendment of the HOEPP was, at least to that extent, legally ineffective. Shaw, supra; Meagher, supra; Batchelor, supra; Collins, supra; Hoover, supra. A plan administrator's failure to follow the procedures that are set forth in 29 USC §1054(g) and 1082(c)(8) constitutes a substantive violation of ERISA as opposed to a procedural violation, and thus, requires

that relief should be granted to parties that complain about such a violation in every instance. (Id).

The administrator of an employee benefit plan may only administer the plan pursuant to written documents that are consistent with the provisions of ERISA. See 29 USC §1104(a)(1)(D). Thus, since the provisions of the "formal HOEPP plan document" had the effect of reducing the plaintiffs' accrued benefits under the HOEPP, and therefore, were clearly violative of ERISA, they were legally ineffective and cannot be used as a basis for administering the HOEPP. (Id); Meagher, supra.

Instead, the HOEPP must be administered only in a manner that is consistent with the HOEPP governing documents that are in compliance with ERISA. Id. In this instance, the only

such documents are the documents that are contained in Attachment C to the parties' Stipulation. Shaw; Meagher. Therefore, the plaintiffs respectfully request this Court to order that the defendants must administer the HOEPP in the future in this respect in a manner which is consistent with the documents that are contained in Attachment C, and to order the defendants to make the plaintiffs whole for any losses which they have suffered to date, or which they will suffer in the future, as a result of the fact that the defendants have improperly administered the HOEPP in this regard in the past.

B. THE DEFENDANTS' VIOLATION OF 29 USC §1060(b) ALSO ENTITLES THE PLAINTIFFS TO THE RELIEF WHICH THEY ARE SEEKING IN THIS LAWSUIT.

It is undisputed that on June 29, 1987 WHC became a "successor employer"

under the pension plans that had been maintained by the various private contractors that had been operating at the HNR immediately prior to June 29, 1987, and that the assets of those pension plans were "merged" into the new WHC site-wide pension plan for non-bargaining unit employees at the time of consolidation on June 29, 1987. Furthermore, the documents that were distributed to the plaintiffs on or about June 29, 1987 also indicated that the HOEPP was going to be a "multiple employer plan" that was to become effective on June 29, 1987. As of June 29, 1987 WHC also in fact began administering the HOEPP. The defendants also characterized the HOEPP as an "amendment" and "restatement" of several pre-consolidation pension plans at the HNR.

The legislative history of ERISA provides the following amplification of the intent behind the adoption of 29 USC §1060(b):

> "Service with a predecessor employer must be counted for purposes of the plan if the successor employer continues to maintain the plan of the predecessor employer (and, of course, the successor employer cannot evade this requirement by nominally discontinuing the plan). The question of the extent to which such service must be counted in other circumstances is to be determined under regulations." (emphasis added)

ERISA legislative history (1974-1986), Joint Explanatory Statement of the Conference Committee on the Employment Retirement Income Security Act, p. 10 (BNA 1988).

Under the circumstances presented here, the defendants clearly "maintained" the pension plans of the contractors who had been operating at the HNR immediately

prior to June 29, 1987 within the meaning of 29 USC §1060(b) on June 29, 1987 and thereafter when the defendants began administering the HOEPP. (29 USC §1060(b)). Therefore, since the defendants have chosen to maintain the pension plans of several different predecessor employers of the plaintiffs in this matter, the defendants were required by 29 USC §1060(b) to treat the years of service which the plaintiffs had accumulated with each one of those predecessor employers as having been earned under the HOEPP. (See 29 USC §1060(b)).

C. THE PRINCIPLES OF ESTOPPEL ALSO ENTITLE THE PLAINTIFFS TO THE RELIEF WHICH THEY ARE SEEKING IN THIS LAWSUIT.

The traditional doctrine of estoppel should also have entitled the plaintiffs to prevail in this action as well. Blau,

supra; McKnight, supra; Kochendorfer v. Rockdale Sash and Trim Company, Inc., 753 F.Supp. 612 (N.D. of Ill., 1987); Gors v. Venoy, Inc., 578 F.Supp. 365 (E.D. Mich., 1984); Ellenburg v. Brockway, Inc., 763 F.2d 1091 (9th Cir., 1985); Zittrouer v. UARCO, Inc., 582 F.Supp. 1471 (N.D. Ga., 1984).

Based upon the factual situation presented here, and based upon the foregoing case law, plaintiffs would also ask this Court to enter an order to the effect that the defendants were estopped from administering the HOEPP in a manner that would not take into account for benefit calculation purposes the pre-consolidation years of service which the plaintiffs are contending that they have a right to have taken into account under the provisions of the HOEPP. Blau, supra; Ellenburg, supra.

SUMMARY AND CONCLUSIONS

Plaintiffs therefore, for the foregoing reasons, respectfully request this Court to grant their Petition for Certiorari, and, in due course, to reverse the decision of the Ninth Circuit in this matter, and to grant the plaintiffs all of the relief which they are seeking herein.

Respectfully submitted,

CRITCHLOW, WILLIAMS, SCHUSTER, MALONE & SKALBANIA
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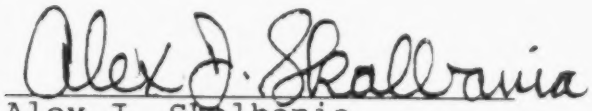
By: 
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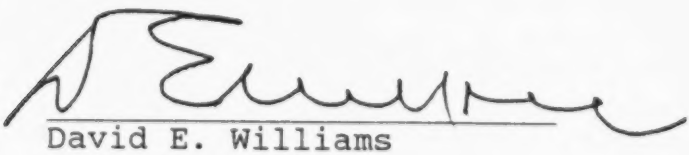
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